Supreme Court, U.S.
FILED

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No. _____

In The

Supreme Court of the United States

October Term, 1997

WALTER SAILE,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the opinion of the Eleventh Circuit in this case properly construed the law of this Court regarding the application of the ex post facto clause and the rule of lenity where the court at Petitioner's sentencing employed a guideline definition of hashish oil which did not exist at the time the offense was committed?

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PETITION FOR A WRIT OF CERTIORARI

Walter Saile respectfully petitions for a writ of certiorari to review the judgment of the Eleventh Circuit Court of Appeals for the United States.

OPINIONS BELOW

The decision of the United States Court of Appeals for the Eleventh Circuit in *United States v. Saile*, Case No. 96-4678 is unreported.

STATEMENT OF JURISDICTION

The Eleventh Circuit delivered its opinion in this case on October 31, 1997. A petition for rehearing was denied on February 11, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254.

CONSTITUTIONAL PROVISIONS INVOLVED

Section 9, Article I of the Constitution of the United States provides that:

No Bill of Attainder or ex post facto Law shall be passed.

U.S. Const. Art. I, § 9.

The Fifth Amendment to the Constitution of the United States provides that:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

U.S. Const. amend. V.

STATEMENT OF THE CASE

This petition raises fundamental questions concerning the power of judiciary to construe an amendment of the sentencing guidelines in an ex post facto manner in derogation of an individual's right to due process under the law. The factual setting involved in this case has yet to be presented to this Court, however, the Eleventh Circuit has failed to apply well-established precedents handed down by this Court in reaching its decision. Further, the decision is in direct conflict with an opinion from the United States Court of Appeals for the First Circuit which reviewed issues of fact and law identical to this case.

Petitioner Walter Saile was convicted in the United States District Court for the Southern District of Florida of conspiracy to possess with intent to distribute a controlled substance derived from marijuana in violation of

21 U.S.C. § 846. This offense occurred on March 4, 1994. At sentencing, the Government contended that the substance involved in the offense was hashish oil which carried a more severe penalty than marijuana under the sentencing guidelines. The record reveals that the substance in question was not a pourable substance but was in a solid form at room temperature. It was not an amber colored liquid but a black, tarry paste.

Armed with these facts, the Government sought the application of § 2D1.1(c), Drug Quantity Table, Note (J), added by Amendment 518, effective November 1, 1995, which provided a definition for hashish oil. The new definition contained language that "[t]ypically, hashish oil is a viscous, dark colored oil, but it can vary from a dry resin to a colorless liquid." Prior to November 1, 1995, no definition of hashish oil existed. The district court nevertheless applied the 1995 definition of hashish oil, thus yielding a higher guideline range than that for marijuana. Petitioner appealed the district court ruling initially citing the ex post facto application of the 1995 definition. The Eleventh Circuit denied the appeal and affirmed the sentence. Petitioner then petitioned for a rehearing based on the discovery of a case from the First Circuit, discussed fully, infra, wherein the rule of lenity was applied to a similarly situated defendant. The court found that the guidelines were ambiguous as to precise definitions in cases involving marijuana extract/hashish oil prior to November 1, 1995. Petitioner raised the rule of lenity issue in his petition for rehearing. On February 11, 1998, the petition for rehearing was denied.

REASONS FOR GRANTING THE WRIT

I. THE DECISION OF THE ELEVENTH CIRCUIT CONFLICTS WITH EXISTING CASE LAW IN THAT THE RULING WORKS AS AN EX POST FACTO APPLICATION OF LAW AS TO PETITIONER AND, FURTHER, FAILS TO CORRECTLY APPLY THE RULE OF LENITY WHERE THE STATUTE IN QUESTION IS AMBIGUOUS.

A. Application of Amendment 518 (statutory definition of hashish oil) to offenses prior to November 1, 1995 violates the ex post facto clause of the Constitution.

The district court accepted the statutory definition of hashish oil effective November 1, 1995 to the offense Petitioner committed on March 4, 1994. The court found that the sentencing commission had merely "clarified or issued a definition of hashish oil." Hearing of March 8, 1996 at p. 132. Additionally, the district court felt that the sentencing commission had added a definition of hashish oil in order to encompass the very type of tarry, pasty, black substance before it. *Id.* at 133. The court stated its belief that the commission did this to avoid "[t]he common sense definition of oil . . . that [the marijuana extract] would ultimately pour." *Id.* at 132. In so doing, the court applied a definition of hashish oil that did not exist at the time the offense was committed.

The United States Court of Appeals for the First Circuit reviewed identical circumstances as those presented in this case and reached the opposite conclusion from the Eleventh Circuit and the district court in this case. The First Circuit found that Amendment 518 did not apply to offenses committed prior to November 1, 1995.

United States v. Bowen, 127 F.3d 9, 13 (1st Cir. 1996). The court also found that:

> Prior to November 1995, the term "hashish oil" was undefined in both the Code, *see* 21 U.S.C. s 841(b)(1)(D), and in the Guidelines. Moreover, the legislative history of the Comprehensive Crime Control Act of 1984, which first enacted the fifty to one ratio and introduced the term "hashish oil" to the Code, is silent as to the meaning of the term. *See* Pub.L. No. 98-473, 98 Stat. 2030, 2070, 2086; S.Rep. No. 98-634 (1984); H.R.Rep. No. 98-1030 (1984). Although the undisputed facts regarding the substance at issue would appear to place it within the current definition, this definition, constituting a significant and substantive addition to the guidelines, cannot be retroactively applied to these defendants. *See United States v. Sanchez*, 81 F.3d 9, 12 (1st Cir. 1996) (Guideline amendment that is not a mere clarification, and that is not covered by the policy statement of section 1B1.10, is not to be applied retroactively). For example, this definition includes a "dry resin" within the scope of the term "hashish oil," a matter which, as discussed below, could not be considered part of the core meaning of "hashish oil" prior to the amendment.

Id. (footnote omitted).

The First Circuit's reasoning is consistent with this Court's precedent concerning ex post facto applications of the law. This Court has decided that an application of law violates the ex post facto clause if it makes more burdensome the punishment for a crime after its commission. *Collins v. Youngblood*, 110 S.Ct. 2715 (1990). In *Weaver*

v. Graham, this Court wrote that the United States Constitution provides that:

> "[n]o state shall . . . pass any . . . ex post facto law." U.S. Const. art. I, Sec. 10, cl. 1. This clause prohibits the states from enacting "any law 'which imposes a punishment for an act which was not punishable at the time it was committed; or imposes additional punishment to that then prescribed.' " *Cummings v. Missouri*, 4 Wall. 277, 325-326, 18 L.Ed. 356 (1867). Thus, in order for a criminal or penal law to be ex post facto, it must be retroactively applied and must disadvantage the offender because it may impose greater punishment. Furthermore, the law need not impair a "vested right" to be ex post facto; a violation may occur when the law "merely alters penal provisions accorded by the grace of the legislature[.]

Weaver v. Graham, 450 U.S. 24, 28-30, 101 S.Ct. 960, 964-65 (1981).

The district court's application of Amendment 518 in this case and the Eleventh Circuit's affirmance was in clear contravention of Petitioner's right to be free from an ex post facto application of law. The First Circuit in *Bowen* recognized this and appropriately reversed the lower court's application of Amendment 518 to a pre-1995 offense.

B. The pre-1995 guidelines are ambiguous as to what constitutes hashish oil and such ambiguity compels the application of the rule of lenity.

This Court has a long-standing history of applying the rule of lenity where a statute's meaning is ambiguous. In *Lander v. United States*, 358 U.S. 169, 177-78, 79 S.Ct. 209, 214 (1958), the Court wrote

> [I]n *Bell v. United States*, 349 U.S. 81, 83, 75 S.Ct. 620, 622, 99 L.Ed. 905, the Court expressed this policy as follows: 'When Congress leaves to the Judiciary the task of imputing to Congress an undeclared will, the ambiguity should be resolved in favor of lenity.' See also *Prince v. United States*, supra; *Gore v. United States*, 357 U.S. 386, 391, 78 S.Ct. 1280, 1283, 2 L.Ed.2d 1405. This policy of lenity means that the Court will not interpret a federal criminal statute so as to increase the penalty that it places on an individual when such an interpretation can be based on no more than a guess as to what Congress intended.

Prior to Amendment 518, Congress had left to the courts precisely what this Court referred to in *Ladner* with regard to defining hashish oil; that is, "the task of imputing to Congress an undeclared will." The Court noted that such ambiguities "should be resolved in favor of the rule of lenity." As the *Bowen* court recognized, even the legislative history of the Comprehensive Crime Control Act of 1984 which introduced the term "hashish oil" is devoid of any definition of the term. *Bowen*, 127 F.3d at 14.

This Court has also expounded upon the policies behind the application of the rule of lenity in the face of

"ambiguity concerning the ambit of criminal statutes." *Rewis v. United States*, 401 U.S. 808, 812, 91 S.Ct. 1056, 1059 (1971). In *United States v. Bass*, the Court wrote:

> In various ways over the years, we have stated that 'when choice has to be made between two readings of what conduct Congress has made a crime, it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite.' *United States v. Universal C.I.T. Credit Corp.*, 344 U.S. 218, 221 – 222, 73 S.Ct. 227, 229, 97 L.Ed. 260 (1952). This principle is founded on two policies that have long been part of our tradition. First, 'a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed. To make the warning fair, so fair as possible the line should be clear.' *McBoyle v. United States*, 283 U.S. 25, 27, 51 S.Ct. 340, 341, 75 L.Ed. 816 (1931) (Holmes, J.). See also *United States v. Cardiff*, 344 U.S. 174, 73 S.Ct. 189, 97 L.Ed. 200 (1952). Second, because of the seriousness of criminal penalties, and because criminal punishment usually represents the moral condemnation of the community, legislatures and not courts should define criminal activity. This policy embodies 'the instinctive distastes against men languishing in prison unless the lawmaker has clearly said they should.' H. Friendly Mr. Justice Frankfurter and the Reading of Statutes, in Benchmarks 196, 209 (1967). Thus, where there is ambiguity in a criminal statute, doubts are resolved in favor of the defendant.

404 U.S. 336, 348-49, 92 S.Ct. 515, 522-23 (1971).

While the *Bass* opinion refers to the seriousness of criminal penalties as a basis for the application of the rule of lenity, the Court has also found that amount of punishment, such as the issue here, is also within the rule's reach. In *Bifulco v. United States*, 447 U.S. 381, 387 (1980), the Court quoted *Ladner*, supra, in stating:

> "This policy of lenity means that the Court will not interpret a federal criminal statute so as to increase the penalty that it places on an individual when such an interpretation can be based on no more than a guess as to what Congress intended."

Petitioner at no time contested the fact that the substance involved contained marijuana. However, the district court erroneously did not accept that concession and chose to increase the penalty imposed upon Petitioner by applying a post-offense definition of hashish oil. This action was taken in total disregard for the rule of lenity.

As recently as 1997, this Court has reviewed a Court of Appeals opinion and found that the rule of lenity was not properly considered. *United States v. Lanier*, 117 S.Ct. 1219, 1225 (1997). Justice Souter, in writing for a unanimous court discussed the "fair warning" aspect of the application of the rule of lenity:

> There are three related manifestations of the fair warning requirement. First, the vagueness doctrine bars enforcement of "a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application." *Connally v. General Constr. Co.*, 269 U.S. 385, 391, 46 S.Ct. 126, 127, 70 L.Ed. 322 (1926); *accord Kolender v. Lawson*, 461 U.S. 352,

357, 103 S.Ct. 1855, 1858, 75 L.Ed.2d 903 (1983); *Lanzetta v. New Jersey*, 306 U.S. 451, 453, 59 S.Ct. 618, 619, 83 L.Ed. 888 (1939). Second, as a sort of "junior version of the vagueness doctrine," H. Packer, *The Limits of the Criminal Sanction* 95 (1968), the canon of strict construction of criminal statutes, or rule of lenity, ensures fair warning by so resolving ambiguity in a criminal statute as to apply it only to conduct clearly covered. *See, e.g., Liparota v. United States*, 471 U.S. 419, 427, 105 S.Ct. 2084, 2089, 85 L.Ed.2d 434 (1985); *United States v. Bass*, 404 U.S. 336, 347-348, 92 S.Ct. 515, 522-523, 30 L.Ed.2d 488 (1971); *McBoyle*, supra, at 27, 51 S.Ct., at 341. Third, although clarity at the requisite level may be supplied by judicial gloss on an otherwise uncertain statute, *see, e.g., Bouie*, supra, at 357-359, 84 S.Ct., at 1704-1706; *Kolender*, supra, at 355-356, 103 S.Ct., at 1856-1858; *Lanzetta*, supra, at 455-457, 59 S.Ct., at 619-621; J. Jeffries, *Legality, Vagueness, and the Construction of Penal Statutes*, 71 Va. L.Rev. 189, 207 (1985), due process bars courts from applying a novel construction of a criminal statute to conduct that neither the statute nor any prior judicial decision has fairly disclosed to be within its scope, *see, e.g., Marks v. United States*, 430 U.S. 188, 191-192, 97 S.Ct. 990, 992-993, 51 L.Ed.2d 260 (1977); *Rabe v. Washington*, 405 U.S. 313, 92 S.Ct. 993, 31 L.Ed.2d 258 (1972); *Bouie*, supra, at 353-354, 84 S.Ct., at 1702-1703; *cf.* U.S. Const. Art. I, § 9, cl. 3; id., § 10, cl. 1; *Bouie*, supra, at 353-354, 84 S.Ct., at 1702-1703 (Ex Post Facto Clauses bar legislatures from making substantive criminal offenses retroactive). In each of these guises, the touchstone is whether the statute, either standing alone or as construed, made it reasonably

clear at the relevant time that the defendant's conduct was criminal.

In *Bowen*, supra, the First Circuit correctly applied the rule of lenity as instructed by the precedent set down by this Court. The court wrote

> the rule of lenity commands that genuine ambiguities affecting a criminal statute's scope be resolved in the defendant's favor. *See, e.g., United States v. Lanier*, -- U.S. --, --, 117 S.Ct. 1219, 1225, 137 L.Ed.2d 432 (1997); *United States v. Nippon Paper Indus. Co.*, 109 F.3d 1, 7-8 (1st Cir.1997) (collecting cases). The important purposes served by the rule of lenity include the following: "to promote fair notice to those subject to the criminal laws, to minimize the risk of selective or arbitrary enforcement, and to maintain the proper balance between Congress, prosecutors, and courts." *United States v. Kozminski*, 487 U.S. 931, 952, 108 S.Ct. 2751, 2764, 101 L.Ed.2d 788 (1988). However, the rule only "properly comes into play when, at the end of a thorough inquiry, the meaning of a criminal statute remains obscure." *United States v. O'Neil*, 11 F.3d 292, 301 n. 10 (1st Cir.1993). Put another way, the rule of lenity means that "the Court will not interpret a federal criminal statute so as to increase the penalty that it places on an individual when such an interpretation can be based on no more than a guess as to what Congress intended." *Ladner v. United States*, 358 U.S. 169, 178, 79 S.Ct. 209, 214, 3 L.Ed.2d 199 (1958).
>
> . . .
>
> The record indicates that the substance, although undoubtedly a controlled substance, did not have the slippery, viscous, or liquid

> properties of an "oil," at least as that term is commonly used. This fact is, in our opinion, critical to our conclusion that the rule of lenity applies in this case.
>
> . . .
>
> For lenity to be appropriate, genuine and insurmountable doubt must exist as to whether Congress, in enacting a higher penalty for "hashish oil," intended to include this particular, tarry substance within its scope.
>
> . . .
>
> Even on the basis of the publications cited and quoted by the district court in its order, we find that, at the very least, there exists ambiguity as to whether "hashish oil": (a) must be a liquid (or readily pourable, or capable of being administered in drops) at room temperature; and (b) must have a THC level in a range significantly higher than that of marihuana. We therefore conclude that the rule of lenity should have been applied in this case, requiring a narrower construction of "hashish oil." Had the substance been a potent liquid, derived from cannabis, and lacking plant material, then the rule of lenity would not have been appropriate.

Bowen, 127 F.3d at 13-15.

There are two district court opinions, both cited by the *Bowen* court, wherein a sentencing court conducted a hearing on the question of marijuana extract versus hashish oil; *United States v. Gravelle*, 819 F. Supp. 1076 (S.D. Fla. 1993) and *United States v. Schultz*, 810 F. Supp. 230 (S.D. Ohio 1992), *conviction affirmed, sentence vacated on other grounds*, 14 F.3d 1093 (6th Cir. 1994). In *Schultz*, the

court described the substance in question as a "very dark, non-pourable, extract of the marijuana plant, with a tar-like consistency and a THC content of between 10 and 14 percent." *Schultz*, 810 F. Supp. at 231. The court noted that no specific definition of hashish oil existed. *Id.* at 234. However, the court did cite to a DEA publication entitled Drugs of Abuse at page 37 wherein it states that "hashish oil . . . [is] a dark, viscous liquid, currently samples of which average about 20 percent THC." *Id.* at 232. The court also cited 21 U.S.C. § 802(16) and its definition of marijuana stating that "the Code defines all THC bearing parts of the marijuana plant as well as their derivatives as marijuana." *Id.* at 233. The court also noted that the Government's expert at Schultz' sentencing hearing testified that the term marijuana "covers all of the marijuana products such as hashish and hash oil." *Id.* The *Schultz* court then concluded that, with no concrete and applicable definition at hand, the rule of lenity compelled the decision that the substance in question was not hash oil.

A similar conclusion was reached in the *Gravelle* case, supra. The court began its analysis by making factual findings. The court found that: 1) "The substance is a dark-greenish, almost black, tarry, gummy paste which does not flow. The substance has the odor of marijuana"; 2) the THC content of the paste was between 16 and 23% and; 3) "the paste is made from the left-over portions of marijuana plants, after the useful parts (such as the flowers) have been removed." 819 F. Supp. at 1078. The court noted that the guidelines did not define hashish oil but cited, as did the *Schultz* court, to the DEA Drugs of Abuse publication. The court found that the substance before it did not fit the DEA's definition as the "substance

is paste which does not flow. Therefore, substance does not fit the description of a dark, viscous liquid." *Id.* The *Gravelle* court also cited to a definition presented by the defendants' expert who stated that hashish oil is a clear, golden-colored liquid. The court noted that the substance in question was "a dark paste, not a clear golden-colored liquid." *Id.* at 1079. With that, the court found that the substance in question was marijuana, not hashish oil. *Id.*

II. THE QUESTION PRESENTED IS IMPORTANT

The question presented in this petition is important for two reasons. First, the decision of the Eleventh Circuit in allowing the district Court's retroactive application of a substantive guideline amendment and its refusal to apply the rule of lenity conflicts with the decision in *United States v. Bowen,* issued in the First Circuit. The facts in the *Bowen* case are simply identical to the facts here. The instant offense involved a controlled substance that was a marijuana derivative consisting of a black paste with relatively low THC content and visible plant material. The substance was not an "oil" as the term is commonly understood, a meaning which prevailed prior to Amendment 518 of the guidelines. The fact that the First Circuit has decided a case in one manner while the Eleventh Circuit, faced with the exact same set of facts and circumstances, chooses to decide the case in the opposite manner while ignoring a criminal defendant's rights under the due process clause should be cause for this Court's concern. Petitioner should not be required to languish in prison based on an ambiguity in the law in effect at the time the offense was committed.

The second basis for the assertion that the question presented in this case is important lies in the fact that the Eleventh Circuit's affirmance of the district Court's decision is in conflict with this Court's decisions regarding the application of the rule of lenity where the applicable law is ambiguous. There was absolutely no consideration of the rule of lenity by the district and circuit courts. An appropriate remedy in this case would be a remand to the Court of Appeals for consideration of whether the rule of lenity was properly considered by the district court and for further remand to the district court in the absence of such consideration.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 96-4678
Non-Argument Calendar

D. C. Docket No. 94-6046-CR-DTKH

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

WALTER RAYMOND SAILE,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Florida

(Filed October 31, 1997)

Before BIRCH, CARNES and BARKETT, Circuit Judges.

PER CURIAM:

Walter Saile appeals from his conviction for conspiring to possess hashish oil with the intent to distribute it. On appeal, he argues that: (1) the district court committed clear error by finding that the controlled substance was hashish oil; and (2) the district court violated the Ex Post Facto Clause by considering, in addition to the evidence presented, a definition of hashish oil which was added to the Sentencing Guidelines after Saile committed this offense.

We have reviewed the record and the argument of the parties, and conclude that there was no reversible error.

AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 96-4678
Non-Argument Calendar

District Court No. 94-6046-CR

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

WALTER RAYMOND SAILE,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Florida

Before BIRCH, CARNES and BARKETT, Circuit Judges.

JUDGMENT

(Filed Oct. 31, 1997)

This cause came to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was taken under submission by the Court upon the record and briefs on file, pursuant to Eleventh Circuit Rule 34-3;

UPON CONSIDERATION WHEREOF, it is now hereby ordered and adjudged by this Court that the **judgment of conviction and sentence imposed by the said**

District Court in this cause be and the same is hereby **AFFIRMED.**

Entered: October 31, 1997
For the Court: Thomas K. Kahn, Clerk

By: /s/ Matt Davidson
Deputy Clerk

ISSUED AS MANDATE: 2/20/98

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 96-4678

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

WALTER RAYMOND SAILE,

Defendant-Appellant.

On Appeal from the United States District Court
for the Southern District of Florida

(Filed Feb. 11, 1998)

BEFORE BIRCH, CARNES and BARKETT, Circuit Judges.

PER CURIAM:

The petition(s) for rehearing filed by the Appellant, Walter Raymond Saile is denied,

ENTERED FOR THE COURT:

/s/ Illegible
UNITED STATES CIRCUIT JUDGE

[p. 1] UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
NORTHERN DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. WALTER R. SAILE, JAMES GREGORY STONE, and MARY D. WATKINSON, Defendant [sic].	)	Docket No. 94-6046-Cr-HURLEY West Palm Beach, Fl. March 8, 1996 1:30 p.m.

TRANSCRIPT OF SENTENCE HEARING
BEFORE THE HONORABLE DANIEL T.K. HURLEY

APPEARANCES:

For the Government:	BARRY SABIN, Assistant U.S. Attorney.
For Defendant SAILE:	GARY KOLLIN, ESQ.
For Defendant STONE:	BONNIE PHILLIP-WILLIAMS, ESQ.
For Defendant WATKINSON:	ANTHONY NATALE, ESQ.
Court Reporter:	Pauline A. Stipes C.S.R, C.M. United States Courthouse West Palm Beach, FL 33401

* * *

[p. 130] THE COURT: All right. Counsel for the Government?

MR. SABIN: No response.

THE COURT: All right. As counsel are aware, when an objection of this type is lodged, and, of course, the objection here really is to a basic factual issue and, that is, the defense has lodged an objection in a timely fashion pursuant to Administrative Order 95-02 of the court, and the defense has asserted by filing that objection and has put into contest, if you will , exactly what is this substance. That is terribly important, because as we are all aware the Sentencing Guidelines dictate very different treatment of three major categories of marijuana products; marijuana, secondly, hashish, and third, hashish oil.

So the filing of the objection under the case law, particularly the case of the United States versus Lawrence, which is found at 47 F.3rd, 1559, 1995 decision of the 11th Circuit, and a more recent decision, I believe the case is United States versus Bernardine, B-e-r-n-a-r-d-i-n-e, and the court reaffirmed the fact that when objections of this type are lodged, it is incumbent on the Government to come forth with substantial competent evidence to establish its point by a preponderance of the evidence. So that is the issue that is before the court, and that's whether the Government has met its burden of proving the nature of the substance that was seized.

This is a difficult area as evidenced by some of the [p. 131] cases that exist. Judge Highsmith of this court was confronted with this issue in the case of United States versus Gravelle, G-r-a-v-e-l-l-e, 819 F.Supplement, page 1076, that is a 1993 decision of the United States District Court for the Southern District of Florida. Judge Highsmith's decision actually came after a similar analysis that was rendered by Judge Spiegel, S-p-i-e-g-e-l, sitting

in the Southern District of Ohio in a case called United States versus Schultz, which is found at 810 F.Supplement, page 230. That is a 1992 decision, and Judge Spiegel was confronted with, apparently, as was Judge Highsmith, by the way, with a situation much like today where different experts came in and reached, categorically, different positions.

Interestingly enough, Judge Spiegel's decision in the Schultz case reached the 6th Circuit which noted in passing that Judge Spiegel had held an evidentiary hearing to help him determine the chemical identity of the marijuana product found in the Defendant's home, and after considerable and conflicting expert testimony, the court found that the definition of hashish oil in the guidelines was too ambiguous to fit clearly the substance in question and, therefore, the court felt obliged to apply the Rule of Lenity, and found for sentencing purposes the substance was not hashish oil but was merely hashish. And that is the last reference to it in the appellate court opinion, so, apparently, the Government did not cross [p. 132] appeal. I think that is the only thing you can assume from that.

And it appears that perhaps subsequent to all of this United States Sentencing Guidelines Commission has clarified or issued a definition of hashish oil, and Mr. Kollin pointed out his belief that took effect after the event in this case. And my impression, frankly, is that that definition probably resulted from this case law because it is the practice, at least it is my understanding that it is the practice of the Sentencing Commission to very closely watch the case law to monitor problems and to try to respond, and interestingly enough in both of the

trial court opinions there was a great deal of discussion about would the substance pour, what was it?

The common sense definition of oil, no matter how viscus it may be, is that it ultimately would pour, and so when the Guidelines Commission met and offered 2D1.1(J), the definition is that hashish oil for the purpose of this Guideline means a preparation of the soluble cannabinoids derived from cannabis that include – and I won't go into the various scientific names – but include various items, chemical compounds, obviously, and goes on to say and is essentially free of plant material, that is plant fragments, and then this interesting last sentence, because I think this was probably added in response to some of the discussions in these cases. [p. 133] Typically hashish oil is a viscous dark colored oil, but it can vary from a dry resin to a colorless liquid.

Now, I want to begin by thanking counsel on both sides for the amount of time and effort they have spent to prepare, and two very fine experts have come forth to testify, and it is always difficult to have to make decisions when there is that type of conflict, particularly in an area of expertise like that.

But having listened to the testimony, having considered the background and experience of both of the witnesses, I conclude that Dr. ElSolhy's testimony is more credible, and I accept his testimony and do rely upon it.

And having done so – and I say that in deference to the tests that were performed, and so on – I do conclude that the substance that was seized from the defendants in this case was in fact hashish oil.

Now, let me say that in reaching this conclusion I have also considered and found credible the testimony of Agent Law.

I find credible his testimony that, first, he has had a good deal of experience in this area, and he looked at all of the substance that was seized, and first and foremost it all appeared to him to be the same, because after all, an argument has been made today that they only scooped a sample from here and there, and finally only sent two samples off to be tested, [p. 134] but I think the agent's testimony that all of the substance appeared to him to be the same is important testimony in that regard, and also that from his background and experience that it appeared to him to be what he called hashish oil, albeit in a solidified form. I am not relying on his testimony that it was hashish oil, but to look at the issue whether it was possible that a substance in one receptical might have been different than that contained in others. I think that the agent's testimony is credible, and I do rely upon it for that purpose.

So, I find, as a matter of fact, based upon the preponderance of the evidence presented to me here today that the substance seized from the defendants was in fact hashish oil.

I say that both in terms of scientifically what it was, based on the doctor's testimony, Dr. ElSolhy, and I think in a real sense that the Sentencing Guideline definition that has subsequently been enacted simply reconfirms that, because I think that Guideline confirms existing scientific understanding. In other words, I don't think we have a expo facto problem of the Guideline being crafted

to have a more encompassing sweep to bring within it something that previously would not have been classified as hashish oil.

Now, I am not for a minute suggesting that there has not been some controversy.

[p. 135] That is evident by Judge Spiegel's opinion and Judge Highsmith.

But I think upon reflection, and looking at the literature that the doctor alluded to, that I think that his testimony substantiates that there really are three products that are developed, and although we tend to think of hashish oil as being a liquid, it can in fact take a more solid appearance.

His testimony about the benefits in doing this, it seems to me, are also important factors by reducing and concentrating the substance, you end up with a substance that is more easy to transport, and I think that that justifies, obviously, a different approach to these substances by the Sentencing Commission.

So, for all of these reasons and acknowledging fully this has been an interesting afternoon of listening to this, and something that you would have thought would be automatically resolved scientifically at this point and yet hearing it has been a source of controversy in this country, and apparently outside United States, as well, I am going to find that the Government has established its proposition by the preponderance of the evidence, and so I will resolve that issue in that fashion.

Now, we have been here since about 1:30, and it is close to 5:30, and we have several issues, it seems to me, that [p. 136] need to be resolved.

I know that everybody is anxious to approach this and get it resolved, but I think we probably need to stop at this point and reschedule the remainder of the sentencing proceeding.

I will get with Mr. Caldwell and will do that as quickly as I can, and we can come back and deal individually with the other matters.

It was my understanding that this was the only common matter that really needed to be resolved, is that right?

MR. NATALE: Yes.

THE COURT: Again, I apologize, I know everybody would like to address the remainder of the issues. This is something that is hanging over everybody's head, and I know produces anxiety. Today was something that had to be done. As Mr. Kollin pointed out, it was a crucial importance. Everybody understood from the beginning that no one was suggesting that this was a do away with the event, but the classification of what it is is terribly important, because it does have an impact under the guidelines.

MR. SABIN: For classification of common matters, in terms of the statute, whether the mandatory minimum applies, I believe all counsel has made that objection.

THE COURT: I understand that and I think I can rule on that individually, and I would hope that I

would also rule [p. 137] consistently, so maybe the first time that is argued to me, I will have the benefit of that and other counsel can make the decisions.

MR. KOLLIN: The probation officer who prepared the pre-sentence investigation for Mr. Saile, my pre-sentence is in dispute with the other two PSI,s. The probation officer in mine, so it is shared common knowledge, I believe contacted the Sentencing Guidelines Commission, and his position, and you won't see anything referred to, his position was it didn't exist.

THE COURT: Let me make this suggestion, and here again, it is absolutely imperative that everybody be treated the same, number one, and probably more importantly or equally important is the fact that the correct rule be applied.

So what I am going to do, because I know the probation office has spent a great deal of time at this, I will ask that the probation officers simply consult. If there is a problem, you bring it to my attention. I know counsel will, so the same approach is used for everybody, because, clearly, this is the exact same time frame, and whatever the rule is, it ought to be applied across the board.

Thank you for your help this afternoon. I will continue this matter, and we will resolve that.

(Thereupon, the hearing was concluded.)